Supreme Court, U.S.
FILED
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NO.

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1998

MELANIE ANN ROBINSON,

Petitioner

v

DEPARTMENT OF THE ARMY

Respondent

On review from the

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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24pp

QUESTIONS PRESENTED FOR REVIEW

I.

Whether the Court of Appeals' finding that the Petitioner's mental condition was adequately considered by the MSPB meets the substantial evidence standard.

II.

Whether the Court of Appeals erred in not holding that Petitioner's mental condition in 1996 so precluded her from voluntarily and knowingly entering into the settlement agreement rendering the agreement *void ab initio*.

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No._____

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PETITION FOR CERTIORARI

Opinion Below

The opinion of the Court of Appeals for the Federal Circuit (App. A, infra pp A-1 to A-5).

Jurisdiction

The opinion of the United States Court of Appeals

for the Federal Circuit was issued on August 7, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1).

Statutory and Constitutional Provisions

The pertinent provision of the federal statute involved is set forth below:

> (c) In any case filed in the Unites States Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be--
>
> (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (2) obtained without procedures required by law, rule, or regulation having been followed; or
>
> (3) unsupported by substantial evidence; except that in the case of discrimination brought under any section referred to in subsection (b) (2) of this section, the employee or applicant shall have the right to have the facts subject to trial de novo by the reviewing court.

5 U.S.C. Sec. 7703 (c)

Statement of the Case

This case involves the challenge of a decision of the Merit Systems Protection Board ("MSPB") to enforce a settlement agreement by Petitioner Melanie A. Robinson ("Ms. Robinson" or "Petitioner"). The Petitioner contended that due to her mental condition she was under duress at the time the settlement agreement was negotiated and executed.

On June 28, 1996, Ms. Robinson was removed from her position with the U.S. Corp. of Engineers, effective July 5, 1996, for failing to follow established leave procedures and for being absent without approved leave, although she had applied for leave under various employee programs and been denied. Petitioner appealed her removal from Federal employment to the MSPB on the grounds that the Corp of Engineers ("agency") had failed to grant her the leave that her mental condition required and therefore failed to make a reasonable accommodation.

Subsequently, Ms. Robinson retained attorney Jasper C. Rowe to represent her. A settlement agreement was entered by the agency's attorney and Ms. Robinson's attorney, Mr. Rowe. During this time, Ms. Robinson was under the care of a Psychiatrist and a Psychologist and taking medication for her mental and emotional condition.

The administrative Law Judge issued an Initial Decision on November 4, 1996, accepting the settlement agreement. The record indicates the Judge notified Ms. Robinson that the Initial Decision would become final unless she filed a petition for review on December 9, 1996. Although Ms. Robinson raised questions about whether a "secret settlement" had been reached between the agency and her representative concerning attorney fees, it does not appear she formally filed a petition for review prior to December 9, 1996. Again, during this period Ms. Robinson was on medication and under the care of her psychiatrist and psychologist. The Initial Decision became a final board decision.

When Ms. Robinson raised a issue regarding a dispute with her representative, in January 1997, the judge treated it as a petition for enforcement of the settlement. On March 31, 1997 the administrative law judge denied the petition for enforcement on the grounds that the agency had complied with the terms of the agreement, and determined the board lack authority to resolve the dispute between Ms. Robinson and Mr. Rowe, her attorney.

Ms. Robinson subsequently petitioned the board for

review of the petition for enforcement of the settlement in the Initial Decision and further requested that there be a reconsideration of the December 9,1996 decision to accept the settlement. She filed a motion on May 16, 1997 to have her submission accepted as timely or , in the alternative, to have the time limits waived. She cited as good cause her mental condition during the period she was to have appealed. The MSPB denied her petition on January 23, 1998.

On February 20, 1998, Ms. Robinson filed a timely appeal of the MSPB's decision to the United States Court of Appeals for the Federal Circuit. Both Ms. Robinson and the Department of the Army submitted informal briefs pursuant to the Rules of that Court. On August 7, 1998 that Court affirmed the MSPB's ruling. The mandate was issued on September 28, 1998. (App. B)

Argument

I

The Court of Appeal's finding that the Board adequately considered Petitioner's mental capacity at the time of the Settlement is not supported by substantial evidence.

The Court is empowered to set aside only those decisions made by the Merit System Protection Board which

are arbitrary, capricious, or unsupported by substantial evidence. Doyle v. Veterans Administration, 667 F. 2d 70, 71 (Ct. Cl. 1981) "Substantial evidence" is such relevant evidence as a reasonable mind might accept as adequate to support the conclusion. Jones v. Secretary, Dept. of Army, 912 F Supp. 1397, 1413, (D. Kan. 1995).

In her petition seeking review of the Administrative Law Judge's decision, the Petitioner submitted evidence from her psychologist which substantiated her mental condition at the time of the 1996 settlement negotiations.(App. C) Evidence that Ms. Robinson raised the question of the "secret agreement" shortly after the settlement doesn't disprove her psychologist's opinion in this area. There was no substantial evidence to support the Court of Appeals on this issue. The fact that Ms. Robinson's underlying claim of disability was based on her mental condition does not prove that the administrative law judge made a determination of whether her mental condition impaired her ability to timely file a challenge to the settlement agreement.

II

It was error for the Court of Appeals to not hold that Petitioner's mental condition at the time of the settlement agreement rendered that agreement *void ab initio*.

When a release or settlement agreement impacts upon significant federal rights and interests, federal common law controls the interpretation of that particular release of release. Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 343-48 (1971)

The only essential prerequisite for a valid agreement to settle is that the parties mutually assent to the terms and conditions of the agreement. Pugh v. Super Fresh Food Markets, Inc., 640 F Supp. 1306, 1308 (E.D. Pa 1986). Any settlement of federal statutory rights must be agreed to by the claimant voluntarily and knowingly. Mararri v. WCI Steel Inc., 130 F. 3d 1180, 1184 (6th Cir. 1997); Fulgence v. J. Ray McDermott & Co., 662 F. 2d 1207, 1209 (5th Cir. 1981)

Petitioner's position is that due to her mental condition in the fall of 1996 and the medication she was taking at the time her assent to the settlement could not have been made either voluntarily or knowingly. In the absence of such voluntary and knowing conduct on her part, the settlement agreement should not be held to be valid.

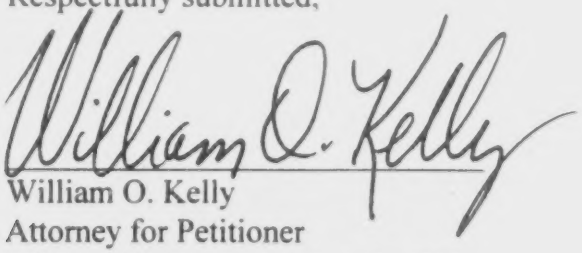
It has been held that a former federal employee's claim that he was "mentally exhausted at the time he entered into a settlement agreement with his former employer, was

insufficient to allow him to void the agreement. See Coleson v. Inspector Gen'l. of Dept. of Defense 721 F. Supp. 763, 769 (E.D. Va. 1989) This is not that case. Here the appellant presented documented , and uncontroverted, psychological evidence of her mental and emotional status at the time of the settlement. It was error for the Court of Appeals to have not found as a matter of law that the settlement agreement disputed here was neither voluntarily or knowingly made. The Petitioner's condition at the time of the agreement was not in position to have entered into the agreement.

Conclusion

This court should review this case because it represents a critical misapplication of the law in an area which potentially impacts thousands of federal employees. For these reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,



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PETITIONER'S APPENDIX

APPENDIX A

NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record. The disposition will appear in tables published periodically.

United States Court of Appeals for the Federal Circuit

98-3167

MELANIE A. ROBINSON,
Petitioner,

v.

DEPARTMENT OF THE ARMY,
Respondent.

DECIDED: August 7, 1998

Before MICHEL, PLAGER, and CLEVENGER, Circuit Judges.

PER CURIAM.

DECISION

Ms. Melanie A. Robinson petitions for review of a decision of the Merit Systems Protection Board ("Board"), Docket No. DA-0752-96-0598-I-1. Ms. Robinson entered into a settlement agreement with the Department of the Army ("Army") after she appealed the Army's decision to remove her from service in 1996. The Board denied Ms. Robinson's untimely petition to review the initial decision which accepted the settlement agreement. Because the Board did not act

arbitrarily in concluding that petitioner filed late without good cause and failed to present new and material evidence warranting review. we affirm.

DISCUSSION

We have jurisdiction to hear this appeal under 28 U.S.C. Sec. 1295(a)(9) (1994). When reviewing a decision by the Board, we may reverse only if the decision was: arbitrary, capricious, and abuse of discretion, or unlawful; procedurally deficient; or unsupported by substantial evidence. See 5 U.S.C. Sec. 7703(c) (1994).

The settlement agreement at issue was entered to resolve Ms. Robinson's appeal following her removal from federal service due to extended absence without approved leave and for failing to follow established leave procedures. Ms. Robinson asserts that her absence was caused by a mental condition that was, at least partially, due to work-related stress. The agreement allowed Ms. Robinson to obtain disability retirement and have records of certain temporary suspensions removed form her file.

Ms. Robinson would like to have her settlement agreement set aside so she can pursue the appeal of her removal from federal service. She maintains that she would

not have entered the agreement had she not been suffering from various psychological ailments.

As an initial matter, Ms. Robinson did not timely petition the Board to review the initial decision which accepted the settlement agreement into the record for enforcement purposes. Instead, she later made a timely petition to the Board for review of the initial decision regarding compliance. At that time, however, she also requested that the Board review the initial decision accepting the agreement. With the petition, she submitted a motion to show "good cause" for the untimely filing. See 5 C.F.R. Sec. 1201.114(f) (1998). She asserted that because of her mental condition, she was unable to meet the earlier filing deadline, and attached a letter from her psychologist with a statement attesting to her mental condition. The Board declined to review the initial decision accepting the settlement agreement. The Board also denied the petition to review the settlement compliance decision, Docket No. DA-0752-96-0598-C-1; however, because Ms. Robinson does not address this decision on appeal, we do not review the Board's denial.

It is questionable whether Ms. Robinson's position, constitutes "good cause" for not timely filing the petition.

There is evidence in the record that only a few days after the settlement agreement was signed, she contacted the administrative law judge regarding a concern she had about the agreement, and she was reminded of the procedures and deadlines involved. At that point, she evidently understood enough to realize there may have been a problem, yet did not timely file a petition for review.

If we assume that she did timely file the petition and her submissions were accepted, we note that she faces a heavy burden in attacking the validity of the settlement agreement. She must prove that the agreement is invalid due to fraud, duress, or a mutual mistake. See Asberry v. United States Postal Serv., 692 F.2d 1378, 1380 (Fed. Cir. 1982). We do not believe she has met this burden of proof. The record shows that Ms. Robinson was aware of and understood the settlement agreement. In addition, since Ms. Robinson's mental condition was the basis for her appeal, the administrative law judge was well aware of her condition. Furthermore, there is no support in the record for the contention of Ms. Robinson's psychologist that it was not Ms. Robinson's choice to enter the agreement. Therefore, the information in the letter from Ms. Robinson's psychologist cannot be considered "new and material" evidence for

purposes of Board review. See 5 C.F.R. Sec. 1201.115 (1998) (Board may grant review if new and material evidence is available that, despite due diligence, was not available when the record closed.).

Finally, we also note that although Ms. Robinson may not have personally participated in the settlement, she is responsible for the actions of her representative. See Amin v. Merit System Protection Bd., 951 F.2d 1247, 1254 (Fed. Cir. 1991). If she is dissatisfied with her attorney's representation, there are alternate avenues for her to pursue. The Army, however, should not bear the responsibility for any alleged misconduct by Ms. Robinson's attorney.

Accordingly, the Board's decision is affirmed.

No costs.

APPENDIX B

United States Court of Appeals for the Federal Circuit

98-3167

MELANIE A. ROBINSON,
Petitioner,

v.

DEPARTMENT OF THE ARMY,
Respondent.

JUDGMENT

ON APPEAL from the MERIT SYSTEMS PROTECTION BOARD

in CASE NO(S). DA0752960598-I-1

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED: AFFIRMED

ENTERED BY ORDER OF THE COURT

DATED AUG 7 1998

/s/ Jan Horbaly
JAN HORBALY, CLERK

ISSUED AS A MANDATE: SEPTEMBER 28, 1998

APPENDIX C

James Cannici Ph.D.
Psychologist
1065 West Magnolia Ave.
Ft. Worth, Texas 76104
817-331-1379

April 30, 1997

The Clerk of the Board
Merit System Protection Board
1120 Vermont Ave., N.W. #802
Washington DC 20419

Dear Clerk:

This letter is in support of Melanie Robinson's contention that she entered into the settlement agreement (DA 072-96-0598-1-1) under duress. She has been a patient of mine since May 1996. I conducted a formal psychological evaluation of her and have been treating her with psychotherapy. Ms. Robinson suffers from severe Major Depression with psychotic features as well as a Conversion Disorder. Due to her mental condition, I attempted to convince her that it was in her best interest to agree to the settlement. I further shared this view with Mr. Jaspar Rowe and Judge Hugh Parker. Ms. Robinson, however, never consented to the settlement agreement. I was never her choice or wish.

If I can be of any further help, please do not hesitate to call.

/s/ James Cannici, Ph.D.

James Cannici, Ph.D.
Psychologist

NO.

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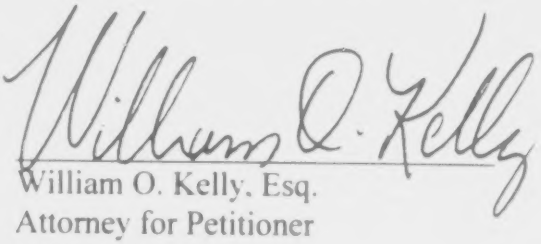
CERTIFICATE OF SERVICE

William O. Kelly
3601 Smith Barry Rd., Suite 201
Arlington, Texas 76013
(817) 860-9929

CERTIFICATE OF SERVICE

I hereby certify that I have deposited in the U.S. mails, postage prepaid, three copies of the above attached Petition for Writ of Certiorari to the Solicitor General of the United States, Room 5614, Department of Justice 10th St. and Constitution Ave., N.W. Washington, D.C. 20530 on this 8th day of January 1999.



William O. Kelly, Esq.
Attorney for Petitioner
Melanie A. Robinson

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

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October Term 1998

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Respondent.

On review from the

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

SUPPLEMENTAL APPENDIX

PETITION FOR WRIT OF CERTIORARI

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UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

MELANIE A. ROBINSON, **Appellant,**	)	**DOCKET NUMBERS** **DA-0752-96-0598-C-1** **DA-0752-96-0598-1-1**
v.	)	
DEPARTMENT OF THE ARMY, **Agency.**	)	**DATE: Jan. 23, 1998**

Melanie A. Robinson, Fort Worth, Texas, pro se.

Joel R. Trautman, Fort Worth, Texas, for the agency.

BEFORE
Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Susanne T. Marshall, Member

ORDER

After full consideration, we DENY the appellant's petition for review of the initial decision issued on November 4, 1996, and the compliance initial decision issued on March 31, 1997, because it does not meet the criteria for review set forth at

5 C.F.R. Section 1201.115. This is the Board's final order in this appeal. The initial decision in this appeal is now final. 5 C.F.R. Section 1201.113(b).

NOTICE TO THE APPELLANT REGARDING FURTHER REVIEW

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See* 5 U.S.C. Section 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. Sec.7703(b)(1).

FOR THE BOARD: /s/ Robert E. Taylor
Robert E. Taylor
Clerk of the Board

Washington, D.C.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
DALLAS REGIONAL OFFICE

MELANIE A. ROBINSON	)	
	)	**Docket No.**
	)	**DA-0752-96-0598-C-1/**
	)	**I-1**
v.	)	
	)	
DEPARTMENT OF THE ARMY	)	
	)	
	)	

MOTION TO ACCEPT FILING AS TIMELY OR TO WAIVE TIME LIMIT

I, Melanie A. Robinson, appellant, request that the Board accept my late-filed document and allow entry of my proof that the document was filed timely or waive the filing deadline for the good cause shown below. I have included a specific and detailed description of the circumstances causing the late filing and have included supporting documentation or other evidence. My reasons for failing to request an extension before the deadline for the submission are also shown below.

At the time of the administrative judge's decision on November 4, 1996 and extending for a period of several months thereafter I suffered from severe major depression with psychotic features. (See Attachment "A") As a result of my mental condition

my speech, mobility and mental facilities were impaired. It was difficult for me to do more than to take care of my personal needs during this time. I was unable to rationally consider my options due to my mental condition. In addition since before the initial decision in November, I have been taking medication and have been under the constant care of my psychologist. I believe my medication also interfered with my ability to function.

It is also my belief that due to my condition I entered into the settlement of my case under duress. I therefor did not believe that I could competently prepare a request for a review of my case due to my mental condition. I was no longer represented by legal counsel at this time and did not feel I was capable of locating and selecting one.

I did not request an extension before the deadline for the submission because I continued to experience the duress and mental stress which had been heightened from the manner in which the settlement was imposed upon me. I was suffering from extreme mistrust and disillusionment of my attorney, and the government. In my mental state during the time I was required to request an extension it did not occur to me to request an extension since I did not believe I could trust anyone. Having gone through therapy for the past several months I now realize this thinking was due to my

condition. My failure to request an extension was not the result of inattention or negligence.

I therefore respectful request that the Board issue an Order accepting filing as timely or to Waive Time Limit and finding good cause for the late filing.

DECLARATION

I, Melanie A. Robinson, do hereby declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on May 16, 1997.
(Date)

/s/ Melanie A. Robinson.
(Signature)

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
DALLAS REGIONAL OFFICE

MELANIE A. ROBINSON, **Appellant,**	)	**DOCKET NUMBER** **DA-0752-96-0598-C-1**
v.	)	
DEPARTMENT OF THE ARMY, **Agency.**	)	**DATE: March 31, 1997**

Melanie A. Robinson, Fort Worth, Texas, pro se.

Joel R. Trautman, Esquire, Fort Worth, Texas, for the agency.

BEFORE

Hugh S. Parker
Administrative Judge

INITIAL DECISION

On January 15, 1997, Melanie A. Robinson filed an enforcement petition in which she alleged that the Department of the Army had violated the settlement agreement which resolved her appeal of a removal action

and that her former attorney has acted improperly and unprofessionally toward her. The agreement had been accepted into the record for enforcement purposes, and the Initial Decision had become a final Board decision. *See Robinson v. Department of the Army*, MSPB Docket No. DA-0752-96-0598-I-1 (Initial Decision, Nov. 4, 1996) (no petition for review filed). The Board has jurisdiction to consider the enforcement petition. *See* 5 U.S.C. Section 1204(a). The petition is adjudicated on the basis of the parties' written submissions.

Based on the following analysis and findings, the enforcement petition is DENIED.

ANALYSIS AND FINDINGS

The appellant has the burden of proving that the agency violated the agreement.

Upon request by the appellant in a proceeding seeking enforcement of a settlement agreement, the agency is obligated to produce relevant, material, and credible evidence of its compliance with the settlement agreement. *Reniere v. Department of Agriculture*, 62 M.S.P.R. 648, 651 (1994). Nevertheless, the ultimate burden is on the appellant, as the party seeking enforcement, to prove that the agency has failed to fulfill the terms of the agreement. *See id.*; *Fredendall v. Veterans Administration*, 38 M.S.P.R. 366, 377 (1988).

The settlement agreement required that the agency cooperate with the appellant's disability retirement application and, in addition, that certain payments be made.

The parties' settlement agreement is signed by the agency's representative and by the attorney who represented the appellant in the appeal of the removal action. The first numbered paragraph of the agreement required the agency to:

> Cooperate fully with the appellant in the filing of an application for disability retirement with the Office of Personnel Management (OPM) for her mental and/or psychological condition which became manifest during the course of appellant's employment with the agency. Specifically, if requested the agency will cooperate by helping appellant complete the paperwork for such application and by providing statements of affidavits in support of such applications.

Appeal File, Tab 9 (parenthesis in the original).

The second numbered paragraph required the agency to take certain actions if OPM approved the disability retirement application. Specifically, upon the occurrence of that OPM approval, the agency will cancel the removal action; expunge the 3-day and 14-day suspensions from the appellant's personnel file; amend her file to reflect a disability retirement; and convert certain days of absence without leave (AWOL) to leave without pay

(LWOP). The agency agreed to take other specified action in the event OPM disapproved the application. *Id.*

The agreement also included a provision regarding (1) attorney fees to be paid by the agency to the appellant's attorney, and (2) an immediate payment to be made by the appellant's attorney to the appellant. Specifically, the fourth numbered paragraph stated:

> Within a reasonable time after the issuance of a final Board decision, [the agency] will pay the appellant's representative $7,500 as reasonable attorney fees for all matters resolved by the agreement, with the agreement that upon receipt of such payment appellant's representative will immediately remit, $5,000 directly to the appellant, and with the agreement that the appellant's representative will make no further demand on the appellant for fees for services rendered on any matter resolved by the agreement.

Appeal File, Tab 9 (underscoring added for emphasis).

Another provision of the agreement includes the following language which resolved two EEO complaints:

> In addition to the settlement of this appeal the appellant agrees that this agreement will serve as a withdrawal of all EEO complaints against the agency, specifically CATS NO. AWHBF O9511F0439 and CATS NO. AWHBFO9609GO120, and to file no additional complaints or appeals relating to agency disciplinary actions taken against the appellant to date.

Id. (capital letters in the original)

I find that the material portions of the agreement are clear and unambiguous.[1] The agency agreed to cooperate fully with the appellant in the filing of her disability retirement. The parties agreed that, if requested, the agency will cooperate by helping her complete the paperwork and by providing statements or affidavits in support of her application. I find that the appellant's EEO complaints were among the matters which were resolved by the agreement and the parties expressly agreed that "the appellant's representative will make no further demand on the appellant for fees for services rendered on any matter resolved by the agreement." Also, I find that the agreement required the agency to pay the appellant's attorney $7,500 as attorney fees for all matters resolved by the agreement and required the appellant's attorney, upon his receipt of the $7,500, to immediately remit $5,000 directly to the appellant. *See Id.*

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[1] A settlement agreement is a contract, the interpretation of which is a question of law. *See Green v. Department of the Army*, 852 F.2d 558, 560 (Fed. Cir. 1988). In construing the terms of a settlement agreement, the words of the agreement are of paramount importance, and the Board will consider parole evidence, or extrinsic evidence not contained in the body of the document, only when the parties intended meaning cannot be determined from the face of the agreement. *See Baig v. Department of the Navy*, 66 M.S.P.R. 269, 274 (1995); *Rothwell v. U.S. Postal Service*, 64 M.S.P.R. 473, 477 (1994).

The agency has complied with the relevant provisions regarding the disability retirement application.

The appellant contended that the agency has not assisted her with her disability retirement application. She submitted a copy of an agency letter dated January 7, 1997, which reflects that the agency had sent the wrong forms to her and that the correct forms were sent with the January 7 letter to her.[2] Her written submissions do not reflect that, after the removal action appeal was settled, she requested the agency's representative or any other agency employee to assist her with her application.

In the agency's initial written response to the enforcement petition, the agency's representative indicated that no specific assertion had been presented to show that the agency had not cooperated fully with the disability retirement application. Later, the agency submitted two memoranda by Employee Relations Specialist Rena F. Whitlock. In a memorandum dated January 24, 1997, she documented that the appellant's disability retirement package was received on January 17, 1997, and was forwarded "to

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[2] The appellant pointed out that the agency sent her forms for disability retirement under the Civil Service Retirement System and that she was employed under the Federal Employees' Retirement System.

DFAS" on January 24, 1997. Compliance File, Tab 7. In a memorandum dated February 7, 1997, Whitlock stated:

> Called Payroll (DFAS) in regards to subject disability retirement package. Craig in Retirements stated that the subject package had been forwarded to OPM on 28 January on Transmittal #FERS-97-000-25.

Id. (parenthetical reference in the original).

During a telephone conference, I discussed various matters with the agency's representative and the appellant. Based on the record and the statements made during the conference, it appears that the agency initially mailed the wrong disability retirement forms to the appellant and that the agency mailed her the correct forms when the agency learned of its mistake. Neither the agency, the appellant, nor her former representative has filed a response to my memorandum of the conference.[3] Compliance File, Tab 8.

The agency's representative has filed evidence to show that the agency is now in compliance with the settlement agreement provisions related to the disability retirement application. The appellant has not asserted, orally or in writing, that she has ever

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[3] As reflected by the record, I served a copy of my memorandum on the appellant's former representative, who had not returned my telephone calls. *See* Compliance File, Tab 8.

requested that the agency assist her with the disability retirement process. Notwithstanding the agency's initial error regarding forms, I find that the evidence does not show that the agency has violated the agreement. *See Conerly v. U.S. Postal Service*, 64 M.S.P.R. 182, 185 (1994) (agency was in compliance with agreement's provision which required the agency to assist with disability retirement applications).

The Board has no authority to resolve the dispute between the appellant and her former representative attorney.

Jasper Rowe is the attorney who represented the appellant in the appeal and who signed the settlement agreement on her behalf. Regarding the final compliance issue, the appellant contended that the agreement entitled her to receive $5,000.00 from Rowe; that she did not subsequently agree to receive less than the full $5,000.00; and that Rowe lied to her orally and in his letter. The settlement agreement and the parties' submissions tend to support these contentions. *See* Appeal File, Tab 9 (settlement agreement; Compliance File, Tabs 1 (enforcement petition), 4 (appellant's supplemental submission), and 6 (agency's argument and evidence in response to supplemental submission); *see also* Compliance File, Tabs 2 (memorandum of Telephone Calls and Conferences) and 8 (Memorandum of Telephone Conference and Notice of Returned Check, with attachments). Although the agency has not disputed

the appellant's evidence and assertions against Rowe, the agency contended that the appellant's former attorney is not a party to the agreement and that the Board has no enforcement jurisdiction in this matter after the Board determines that the agency has complied with the parties' agreement. Compliance File, Tab 6.

After the parties waived the prohibition against ex parte communications, I conducted an in-person conference in which the appellant asserted specific instances of unprofessional conduct by her former attorney.[4] I have no credible reason to doubt any of the appellant's assertions against Rowe.

Although the Board has broad authority to assure compliance with the settlement agreement, and Rowe signed the agreement, I find that Rowe was acting as the appellant's representative and not as a party to the agreement. Accordingly, I find that the agency and the appellant are the only parties to the agreement. The Board has held that an employee is responsible for the actions of her chosen representative. *See Sparkes v. Department of the Interior*, 62 M.S.P.R. 369, 371 (1994). Because the evidence does not prove that the agency violated the agreement, I find that the

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[4] As reflected by my memorandum, one of the appellant's relatives also was present during the conference. Compliance File, Tab 8.

enforcement petition must be denied.[5] *See Conerly*, 64 M.S.P.R. at 185 (imposition of sanctions is not appropriate when the agency has complied with the agreement); *Stipp v. Department of the Army*, 64 M.S.P.R. 124, 128 (1994) (where employee's counsel was not a party to the settlement agreement, the Board had no authority to order employee's counsel to make payment to a party).

Decision

The enforcement petition is DENIED.

FOR THE BOARD:

/s/ Hugh S. Parker
Hugh S. Parker, Administrative Judge

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[5] This compliance decision does not prevent the appellant from filing an enforcement petition in the future if she believes that the agency is not cooperating with her disability retirement application or had otherwise violated the agreeement.

NOTICE TO APPELLANT

This initial decision will become final on May 5, 1997, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is the last day on which you can file a petition for review with the Board. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file your petition with:

The Clerk of the Board
Merit Systems Protection Board
1120 Vermont Avenue, NW., Suite 802
Washington, DC 20419

If you file a petition for review, the Board will obtain the record in your case from the Administrative Judge and you should not submit

anything to the Board that is already part of the record. Your petition must be postmarked or hand-delivered no later than the date this initial decision becomes final. If you fail to provide a statement with your petition that you have either mailed or hand-delivered a copy of your petition to the agency, your petition will be rejected and returned to you.

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 30 calendar days after the date this initial decision becomes final.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
DALLAS FIELD OFFICE

MELANIE A. ROBINSON,	)	
Appellant,	)	**Docket No.**
	)	**DA-0752-96-0598-C-1/**
	)	**1-1**
v.	)	
	)	
DEPARTMENT OF THE ARMY,	)	**DATE: FEB 14, 1997**
Agency.	)	
	)	

MEMORANDUM OF TELEPHONE CONFERENCE AND NOTICE OF RETURN OF CHECK

On February 13, 1997, I conducted a telephone conference with the agency's representative and the appellant. We discussed the following matters:

1. Representation. The appellant represents herself in this compliance case. Attorney Jasper Rowe (972-424-7193) had represented the appellant in some discrimination complaints and in the appeal of the removal action, all of which were resolved by the parties written settlement agreement. The agreement was accepted into the Board's record and the Board retained jurisdiction to enforce the agreement.

2. Settlement provisions. I noted that the parties' settlement agreement required the agency to pay $7,500.00 to Rowe; that Rowe

was to pay $5,000.00 to the appellant as soon as he received the $7,500.00; and that the agency agreed to assist the appellant with her disability retirement application.

3. Compliance dispute. The appellant asserted that the parties' agreement entitled her to receive $5,000.00 from Rowe; that Rowe has not paid or tendered the full amount to her; and that he has lied to her orally and in his letter dated January 7, 1997. In addition, the appellant stated that the agency failed to assist her with her disability retirement application.

4. Uncashed check. With her enforcement petition, the appellant submitted to the Board an uncashed check which she had received from Rowe. The check was drawn on the account of Jasper C. Rowe, Law Office, Client Trust Account, IOLTA. The check, numbered 1124, was for the amount of $3,750.00, and was payable to the order of the appellant. On the check's back, in the same handwriting, was the following statement: "By negotiation of this check, payee acknowledges that she had paid the attorney in full and that no further claims will be made against the other, either by attorney or client."

5. Settlement efforts. I informed the parties that I repeatedly telephoned Rowe during the past four weeks; that I left messages for him about the compliance dispute and potential complaints of

unprofessional conduct; and that he has not returned any of those telephone calls.

6. State Bar. I told the parties that complaints and grievances against an attorney can be addressed to the State Board of Texas, 5910 N. Central Expressway, Suite 900, Dallas, Texas 75206. I informed the parties that, during a brief telephone call to that office, I informed Vivian Mendez (214-368-2168), that the appellant might be filing a grievance or complaint against Rowe.

7. Withdrawal of waiver. Near the end of the conference, the agency's representative withdrew the agency's waiver of the prohibition against ex parte communication.

8. Enclosures. With the copy of this memorandum that is being served on the appellant by certified mail, I am returning the uncashed and unendorsed check. Copies of the front and back of the check are retained with the Board's file in this compliance case. A set of those copies and a copy of the settlement agreement are served as indicated on the attached certificate.

If either party disagrees with this summary, that party must notify the opposing party and me immediately by telephone and confirm the objection in writing within seven days after the date of this memorandum.

FOR THE BOARD:

/s/ Hugh S. Parker
Hugh S. Parker, Administrative Judge
(214) 767-0555

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
DALLAS FIELD OFFICE

MELANIE A. ROBINSON, Appellant, v. DEPARTMENT OF THE ARMY, Agency.	)	Docket No. DA-0752-96-0598-C-1 DATE: JAN 17, 1997

MEMORANDUM OF TELEPHONE CALLS AND CONFERENCES

On January 14, 1997, I returned the appellant's telephone call. She informed me that she had received a check for only $3,750.00 from her former attorney, Jasper Rowe, rather than the $5,000.00 which she was to receive from Rowe under the settlement agreement. I noted that the agreement had resolved the appeal of her removal; that the agreement was made a part of the Board's record for enforcement purposes; and that my initial decision on the removal action had become a final Board decision. The appellant stated that, at her mother's suggestion, she had written down some of her thoughts and that she will come to the Board's office on

January 15. She renewed her prior waivers of the prohibition against ex parte communications for all purposes.

On January 14 and 15, I telephoned Rowe's office and left messages for him to return my telephone calls, but he did not return any of my calls. On January 15, I informed the agency's representative by telephone that the appellant might file an enforcement petition. The agency's representative renewed his prior waiver of the prohibition against ex parte communications for all purposes.

Later on January 15, I conducted an in-person conference with the appellant and her step-father, John H. Ricketto, Jr. A Board employee, Susan Vatalaro, was also present. The appellant submitted her three-page typewritten statement which claimed, in effect, that she should not have been removed and that attorney Rowe had acted improperly and unprofessionally toward her. She also submitted Rowe's uncashed check in the amount of $3,750.00 and Rowe's letter which transmitted the check to her. The back of the check includes the following statement: "By negotiation of this check payee acknowledges that she has paid the attorney in full and that no further claims will be made against each other, either by attorney or client." The appellant orally asserted that the agreement entitled her to receive $5,000.00 from Rowe; that she did not

subsequently agree to receive less than the full $5,000.00; and that Rowe has lied to her orally and in his letter. In addition, she submitted a copy of an agency letter dated January 7, 1997, which reflects that the agency had sent the wrong forms to her and that the correct forms were sent with the letter to her. Attached to each copy of this memorandum is a copy of the appellant's three-page statement, the agency's letter, Rowe's letter, and the front and back of Rowe's check.

On January 15, while the appellant and Ricketto--- were present, I conducted a conference which also included the agency's representative on a speaker telephone. I informed him that the appellant was representing herself and that I was accepting her documents as an enforcement petition. I said that the issues in this enforcement or compliance case relate to two provisions: (1) the agency's promise to assist the appellant with her disability retirement application, and

(2) the $5,000.00 to be paid to her. I stated that I will issue an Acknowledgment Order on the enforcement petition and that I later will conduct a telephonic conference to discuss further the compliance issues. The appellant said that she will mail the completed forms to the agency and will mail a copy of the medical documents which she had sent to the agency with her previous

application. I reminded the parties that the issues in the original appeal were resolved by the settlement agreement and are no longer at issue. Although the Board has broad authority to assure compliance with the settlement agreement, I pointed out that I have not decided whether the appellant's claim against Rowe can be adjudicated by the Board. I stated that I might issue a notice to inform Rowe of a right to request to intervene in this compliance dispute.

If either party disagrees with this summary, that party must notify the opposing party and me immediately by telephone and confirm the objection in writing within seven days after the date of this memorandum.

FOR THE BOARD: /s/ Hugh S. Parker
Hugh S. Parker
Administrative Judge

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
DALLAS FIELD OFFICE

MELANIE A. ROBINSON, Appellant, v. DEPARTMENT OF THE ARMY, Agency.	DOCKET NUMBER DA-0752-96-0598-I-1 DATE: Nov. 4, 1996

Jasper C. Rowe, Esquire, Plano, Texas, for the appellant.

Joel R. Trautman, Esquire, Fort Worth, Texas, for the agency.

BEFORE

Hugh S. Parker
Administrative Judge

INITIAL DECISION

On July 25, 1996, Melanie A. Robinson appealed the action of the Department of the Army that removed her from the Federal service, effective July 5, 1995. The Board has jurisdiction over the appeal. *See* 5 U.S.C. Section 7511-7513.

At the appellant's request, hearing was scheduled[6]

On October 30, 1996, the parties orally settled the appeal, and they requested that the Board retain jurisdiction to enforce their agreement. I have received a copy of the written agreement which the representatives signed. I find that the agreement is lawful; that it was freely reached by the parties; and that the parties understand its terms. I accept the agreement into the record for enforcement purposes. Accordingly, I find that the appeal must be dismissed and that the Board will retain jurisdiction to enforce the agreement. 5 C.F.R. Section 1201.41(c)(2) (1996).

DECISION

The appeal is DISMISSED.

FOR THE BOARD: /s/ Hugh S. Parker
Hugh S. Parker
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on December 9, 1996, unless a petition for review is filed by that date or the Board reopens

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[6] At the request of the appellant's representative, the hearing was continued to October 29, 1996, and again to November 13, 1996. Because the appeal is settled, the hearing is cancelled.

the case on its own motion. This is an important date because it is the last day on which can file a petition for review with the Board. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review if you believe that the settlement agreement is unlawful, was involuntary, or was the result of fraud or mutual mistake. Your petition, with supporting evidence and argument, must be filed with:

The Clerk of the Board
Merit Systems Protection Board
1120 Vermont Avenue, NW., Suite 802
Washington, DC 20419

If you file a petition for review, the Board will obtain the record in your case from the Administrative Judge and you should not submit anything to the Board that is already part of the record. Your petition must be postmarked or hand-delivered no later that the date this initial decision becomes final. If you fail to provide a statement

with your petition that you have either mailed or hand-delivered a copy of your petition to the agency, your petition will be rejected and returned to you.

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 30 calendar days after the date this initial decision becomes final.

ENFORCEMENT

If the settlement agreement has been made part of the record, and the agency has not fully complied with the terms of the agreement after this initial decision has become final, you may ask the Board to enforce the settlement agreement by filing a motion with this office.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

STATEMENT

I, the appellant, Ms. Melanie A. Robinson, contend that the "settlement agreement" was entered into under extreme duress.

I do solemnly swear that the terms of the settlement were never discussed with me prior to it being submitted to the Honorable Judge Hugh S. Parker, Administrative Judge, United States of America, Merit Systems Protection Board, Dallas Field Office, Dallas, Texas.

The actions taken by Mr. Jasper C. Rowe, attorney at the law Offices of Jasper C. Rowe, J.D., 555 Republic Drive, Suite 200, Plano, Texas 75074, and Mr. Joel R. Trautman, Esquire, attorney for the United States Army Corps of Engineers, Fort Worth District, 819 Taylor Street, Fort Worth, 76102-0300, to draft up this "settlement agreement" was never discussed with me. The actions taken were as follows:

#1 Discussions on the terms of the agreement prior to the drafting of this agreement;

#2 Discussions of the terms of the agreement during the drafting of this agreement;

#3 Discussions of the terms of the agreement through the final phases of this agreement; and,

#4 Discussions of the terms of the agreement when submitting this agreement to Judge Parker (to convince the Judge that it was in the "best interest" of me, the complainant, to enter this agreement his court inorder (sic) to settle my grievance with the agency).

On October 17, 1996, I received a letter and a telephone call from Mr. Rowe outlining the "Tentative Terms of Negotiated Settlement" (enclosure 2). When I retrieved the certified letter from the post office, I was surprised and hurt by the trickery Mr. Roe had used to deceived me when I had trusted him to represent me, in court, during this lenghtly (sic) legal process. Later that same day, I received a telephone call from Mr. Rowe telling me that he could no longer represent me, unless I agreed to pay him an additional fee of $10,000.00 up front, as a deposit; and other cash payments as they became due. I have a witness (to be named later, if requested) who was in my home during the telephone call with Mr. Rowe. This willing witness will testify that the events during this call from Mr. Rowe left me stressed and unhappy. This witness is also willing to provide testimony to the fact that I never agreed to another agreement except returning to work.

My psychologist, Dr. James Cannici, PhD., along with past psychiatrists, can attest that I have stated from the off-set of this complaint that I would not agree on any terms of an agreement unless the agency would agree to reinstate me back to my job. I have stated all along that I would never comprise any terms set by the agency unless it meant returning to my place of employment. I have stressed, whole-heartly, that I wanted my job back and the truth to be told. My current doctor, Dr. Cannici, has provided a statement, in the form of a letter, to be included into this petition to the Board (enclosure 3) in support of my mental state of mind in connection with this case. My past two psychiatrists, Doctors Basheer Ahmed and N. Duane Purcell wrote several letters to the agency strongly recommending that the agency place me on official leave while I recovered from the illness caused by the newly assigned supervisor, Mr. Paul K. Rodman. Again, the doctors, in their own words, "strongly recommend" that I be placed on official leave status. The agency would not put me on any type of leave; i.e., advanced sick leave, advanced annual leave, denied me the opportunity to participate in the agency's Leave Share Program; or, worksman's (sic) compensation. Instead, the agency charged me

with being absence Without Official Leave (AWOL). These records are a part of the record.

I, the appellant contend that due to my mental disabilities, an illness that the agency NOW admits that it was indeed, work-related due to the actions of the immediate supervisor and other management officials, BOTH, Mr. Rowe and the agency's representative, Mr. Trautman, took unfair and illegal advantage of me in their (the agency) decision to terminate me; and, then later change the termination to "Forced" resignation. AND, Mr. Rowe's actions to put in place HIS AGENDA to draft the terms of the settlement agreement with the agency without my prior knowledge of these actions, inorder (sic) (I believe) to get extra monies from the agency; monies I was not willing or desire to accept. Mr. Rowe's total monies received was $7,500.00 cash. I also suspect that the agency was fully aware of Mr. Rowe's actions because they, Mr. Rowe and the agency was communicating on a constant basis. I, a choice I made myself, did not talk with
Mr. Trautman. I was in contact, verbal communications with the Equal Employment Opportunity Office counselor assigned to my complaint, Mrs. Ardith A. Hamilton, Fort-Worth District. I could not talk with Mr. Trautman because he made a nasty habit of harassing me to the point of fear. I cooperated with Mrs. Hamilton. Mrs. Hamilton made several telephone calls and letter inquiries to my past psychiatrists. I granted her permission to do so because I knew, without her telling so, that she would give the information she was gathering over to Mr. Trautman.

Mr. Rowe and the agency, Mr. Trautman, took unfair advantage of my disabilities and went behind my back to submit this settlement agreement to the Honorable Judge Hugh S. Parker. Judge Parker had no knowledge of my reluctancy (sic) in accepting this "last minute" agreement. Judge Parker was under the impression that I had agreed to this settlement agreement. On October 18, 1996, the very next day after I had received the certified letter and telephone call from Mr. Rowe, I told Judge Parker that I was not in agreement to the settlement agreement. The parties involved convinced the

judge that it was in my "best interest" to accept the agreement as it was written. Mr. Rowe informed Judge Parker that I could no longer afford to pay him for his legal services. (Mr. Rowe did not inform me that he would need an additional $10,000.00 up-front. He had assured me that he would remain on my case, even if we were to go before the United States Supreme Court; therefore, I was determined to retain him as my legal representative through the end of this case. Mr. Rowe lied and deceived me.) I suspect that Mr. Trautman was aware of Mr. Rowe's intentions to drop me during their (both Mr. Rowe and Mr. Trautman) drafting up the terms of the settlement agreement.

Left without an attorney to represent me and being ill (whereas my speech and mobility and my mental facilities (sic) were impaired, I believe Judge Parker felt that the terms of the agreement was sound and solid.

I can not accept this settlement agreement because it is a LIE. I still want the truth to what really happened to me to come out through the Board. Please, I pray, help me.

Thank you.

Sincerely,

/s/ Melanie A. Robinson

Melanie A. Robinson

ENCLOSURE #1

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
DALLAS FIELD OFFICE

MELANIE A. ROBINSON, Appellant,	)	DOCKET NUMBER DA-0752-96-0598-I-1
v.	)	
DEPARTMENT OF THE ARMY, Agency.	)	DATE: Nov. 7, 1996

NOTICE OF REJECTION OF SUBMISSION AND OPPORTUNITY TO REFILE SUBMISSION

On November 4, 1996, I received a copy of the appellant's letter dated November 1, 1996, to her representative and an unsigned note from the appellant to the Board. In the letter, the appellant rejected her representative's proposal to refund to $3,500.00 to her. In her note, the appellant told me of her concern that the agency and her representative might enter into a "secret settlement" regarding attorney fees. The appellant asked me to "check out this."

The appellant failed to include a certificate of service to show that she served her submission on her representative and the agency representative. Because the submission was not properly

filed, the submission is rejected and is returned with the appellant's copy of this Notice. In addition, I received the submission after the appeal had been settled on the basis of the parties' written agreement, and I have issued my initial decision which accepted the parties' written settlement agreement into the record for enforcement purposes.

The parties are reminded that, when I accepted the agreement into the record, I found that the agreement is lawful; that it was freely reached by the parties; and that the parties understand its terms. Implicit in these findings are findings that the written agreement constitutes the entire agreement between the parties and that there is no "secret agreement."

My rulings do not preclude the appellant filing a petition for review to have the settlement agreement set aside. The Board has the authority to set aside the agreement if she shows that the agreement is unlawful, was involuntary, or was the result of fraud or mutual mistake. My ruling also does not preclude her from filing her submission as part of a petition for review. As explained in my Initial Decision, any petition for review must be filed on or before December 9, 1996, and must be addressed to the Clerk of the Board.

FOR THE BOARD: /s/ Hugh S. Parker
Hugh S. Parker

Administrative Judge
(214) 767-0555

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
DALLAS FIELD OFFICE

MELANIE A. ROBINSON, **Appellant,**	)	**DOCKET NUMBER** **DA-0752-96-0598-I-1**
v.	)	
DEPARTMENT OF THE ARMY, **Agency.**	)	

In the interest of avoiding litigation over this appeal, the parties have agreed to the following terms of settlement. By this agreement the Army does not admit to any improper action or violation of law or regulation.

The agency will:

1. Cooperate fully with the appellant in the filing of an application for disability retirement with the Office of Personnel Management (OPM) for her mental and/or psychological condition which became manifest during the course of appellant's employment with the agency. Specifically, if requested the agency will cooperate by helping appellant complete the paperwork for such application and by providing statements or affidavits in support of such application;

2. If OPM approves the appellant's application for disability retirement, the agency will cancel the removal action, expunge the appellant's personnel file of the 3 and 14 day suspensions, and amend the appellant's file to reflect a disability retirement effective the date of the appellant's separation from service. In that event, the agency will convert the days between her last day on the job and her termination date which were charged as AWOL to LWOP;

3. If OPM disapproves that appellant's application for disability retirement the agency agrees to allow the appellant 30 days from the date of such decision to submit a resignation to replace the agency removal action, whereafter the agency will cancel the removal action and replace it with the resignation. However, should the appellant fail to submit a resignation within the 30 day time frame, the agency removal action will stand;

4. Within a reasonable time after the issuance of a final Board decision, pay the appellant's representative $7500 as reasonable attorney fees for all matters resolved by this agreement, with the agreement that upon receipt of such payment appellant's representative will immediately remit $5000 directly to the appellant, and with the agreement that the appellant's representative will make no further demand on the appellant for fees for services rendered on any matter resolved by this agreement.

The appellant will:

1. On or before 30 November 1996, submit to OPM an application for a disability retirement based upon her mental and psychological condition;

2. If OPM disapproves the application for disability retirement and the appellant fails to submit a resignation within the first 30 days thereafter, the appellant agrees to make no further challenge to the agency removal action;

3. In addition to the settlement of this appeal the appellant agrees that this agreement will serve as a withdrawal of all EEO complaints pending against the agency, specifically CATS No. AWHBFO9511F0430 and CATS NO. AWHBFO9606G0120, and to file no additional complaints or appeals relating to agency disciplinary actions taken against the appellant to date.

The parties hereby intend for the Merit Systems Protection Board to maintain jurisdiction over this agreement for enforcement purposes.

FOR THE APPELLANT:

/s/ Jasper C. Rowe — 31 Oct 1996
Jasper C. Rowe
Appellant's Representative — DATE

FOR THE AGENCY:

/s/ Joel R. Trautmann — 30 Oct 96
Joel R. Trautmann — DATE
Agency Representative

"SEAL"
Department of Defense
REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
FORT WORTH DISTRICT, CORPS OF ENGINEERS
P.O. BOX 17300
FORT WORTH, TEXAS 76102-0300

CESWF-ED 28 June 1996

MEMORANDUM FOR Melanie A. Robinson, Reservoir Control Section, Civil Design Branch, Engineering Division

SUBJECT: Decision to Remove From Federal Employment

1. Reference memorandum CESWF-ED-DR dated 13 May 1996 which proposed to remove you from Federal service for (a) being absent without approved leave (AWOL) and for (b) failure to follow established leave procedures. This memorandum represents my decision on the proposed action.

2. The memorandum by Mr. Paul Rodman proposing your removal was mailed to you by regular and certified mail on 13 May 1996. You received the certified copy of the letter on 28 May 1996. Mr. Rodman's memorandum gave you 15 days to respond to the proposed action. On 30 May 1996 your written response to the proposed removal was received.

3. Your written response indicated that the proposed removal action was predicated on reprisal on the part of Mr. Rodman and the department for your protected EEO activities, that both the charges were baseless and without merit and that you have sought to achieve an approved leave status. You indicated that Mr. Rodman was to blame for the denial of your leave requests and that he has intentionally denied your leave so he could place you in an AWOL status. You indicated that you are still under medical treatment for

work-related anxiety and stated that you are seeing a new doctor. You indicated that you thought your medical condition accounted for your absence and that you are still unable to tolerate being at your work station because of anxiety and the damage to your mental health condition caused by your presence at the work place. Additionally, you contended that the 3 and 14 day suspensions imposed by Mr. Rodman were in reprisal for your EEO activities and that Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act were violated.

4. After reviewing your response, the issue of additional medical evidence was raised and I called you on 4 June 1996 to advise you that I would not make a decision on the proposed action until the week of 17 June 1996. I asked you for a statement from your new physician, Dr. Purcell, giving his assessment of your condition and prognosis. I advised you that I would consider a statement from Dr. Purcell if I received it no later than 17 June 1996. However, I have not received any additional medical evidence.

5. After carefully reviewing all of the evidence available to me, I have determined that both charges as described in Mr. Rodman's memorandum are supported by a preponderance of evidence.

a. Regarding the charge of being absent without leave (AWOL), you have not been at work since 8 March 1996. From 9 March through 17 April 1996, you were on approved leave. However, since 18 April 1996 you have continuously been in an AWOL status. My review of the evidence indicates that you were properly placed on AWOL for the period 18 April through 10 May 1996 for a total of 55 hours as charged in Mr. Rodman's memorandum. Simply, you were not at work when your services were needed to accomplish essential work and were not on approved leave of any type. I find no acceptable reason to excuse your absence. Additionally, I believe you were well-aware of the consequences for failure to report for duty. On 16 April you spoke to Major Eric Fleischner in the Executive Office and Marie

Manrique of the Human Resources Office. You were informed by each of these individuals of the consequences of an unapproved absence if you were to fail to show up for work on 18 April. Despite the fact that you had received no approval for your 12 April leave request, and were aware of the consequences, you chose to not to show up for work on that date. Your absence has continued to this date.

(1) I cannot excuse your absence based on the medical evidence you have submitted. Since last fall when management first learned that you were receiving psychiatric treatment, you have been provided great latitude in your behavior and attendance. Because you had exhausted all of your sick and annual leave, you have been granted a total of 208 hours of leave without pay. Although your absences have caused considerable disruption to the functioning of the Reservoir Control Section, they were granted in the interest of providing as much accommodation as possible for your condition.

(2) When management first sought information regarding the nature of your condition you refused to cooperate. Your response was to forbid
Dr. Ahmed, your psychiatrist, from providing management such information. Later, after being presented with your first suspension for misconduct, you released your doctor to advise management regarding your condition. This resulted in management's receipt of a letter from Dr. Ahmed dated 26 February 1996. Management sought this information for the purpose of better understanding the medical condition from which you claimed to be suffering. Management also sought to secure Dr. Ahmed's advice regarding how management might accommodate that condition. In that 26 February letter Dr. Ahmed indicated that your condition was related to anxiety and stress and that the condition was aggravated by your working relationship with your supervisor. Nothing in that statement attributed any fault to your supervisor,
Mr. Rodman, nor suggests that he was the cause of the condition itself as you have claimed. He stated that you did not suffer from a

handicapping condition, not was it likely that your situation would develop into one. None of the letters received from Dr. Ahmed since the 26 February letter has changed the diagnosis made in that letter. Subsequent letters from Dr. Ahmed indicated only that your "condition" has worsened. While Dr. Ahmed did indicate in his letter of
22 April that you were unable to come to work because of the worsened state of your condition, he did not change or revise his prior diagnosis that your condition was not handicapping.

(3) Since receipt of Dr. Ahmed's 26 February 1996 letter, management has been trying to determine what measures it could reasonably take to accommodate your condition, a condition Dr. Ahmed has diagnosed as not handicapping but one made worse by your work relationship with your supervisor. Dr. Ahmed indicated that he had recommended to you that you seek a new supervisory arrangement, revealing further that you had refused to follow that recommendation. While you would have one believe that your condition has been caused by your supervisor, your repeated rejection of any offer or suggestions to change your supervisory arrangement undermines your credibility in that regard. You have repeatedly refused to accept management's offers to attempt to reassign you and have refused to follow the advice of your own doctor in that regard. While a request for assignment to another supervisor was made to the Commander in your 8 May 1996 grievance over my refusal to grant you advance leave, acting on that request would have been inappropriate since this decision was pending on the proposal that you be removed from Federal service. All the while you have resisted Mr. Rodman's efforts to work with you to accommodate your condition and failed to cooperate with his supervision of you. For many months now you have refused to even communicate with him directly. Instead, you have been belligerent and abusive in you (sic) behavior toward him and have treated him with contempt. That pattern of behavior on your part was borne out in the facts underlying your two prior suspensions. I believe that pattern can be detected as continuing in

the facts that underlie the present charges of AWOL and failure to follow established leave procedures.

(4) I denied your 12 April 1996 requests for advance sick, annual and leave without pay by memorandum dated 18 April 1996 (the day you should have reported back to work). You subsequently grieved the denial to the Commander where my decision was upheld. Nothing has come to my attention since then to change my position on that request. In the 8 May grievance you have filed and in the response to the proposed removal action you have indicated that you could return to work if placed in a different work unit with different supervision. Maj. Fleischner suggested such an arrangement to you when you spoke with him on 16 April. Rather than responding to Maj. Fleischner's suggestion, you chose to remain absent from the work place without leave. That action on your part resulted in the proposed removal action. I do not find any offer to accept a change in supervision now to be either timely or helpful. I find your present willingness to accept a change in supervision to be inconsistent with your failure to respond to Maj. Fleischner's suggestion on 16 April, whereafter you chose to not to show up for work on 18 April.

(5) One of the reasons for my 18 April 1996 denial of your requests for advanced sick , annual and leave without pay was that there seemed to be no foreseeable end to the situation where you cannot perform your duties. The same reason was cited by the Leave Sharing Committee when it recommended to the Commander that your application to become a leave recipient be denied. That situation remains unchanged to date and it has now been over 3 months since you have been on duty. Moreover, while the charge of AWOL is only for the period of 18 April through 13 May, you have continued to be AWOL since then.

b. Mr. Rodman's proposal charges you with failure to follow established leave procedures for the period 18 April through 13 May 1996. My review of the evidence indicates that during this period you did not request leave from any person in your supervisory chain

of command. As mentioned above, you requested advance leave and leave without pay by two memorandums both dated 12 April 1996. The denial of those requests was mailed to you by both regular and certified mail on 18 April 1996, the day you were due back at work following expiration of the sick and annual leave and leave without pay which Mr. Rodman had granted. On 18 April, you did not report for duty and did not inquire as to whether or not your request for advance leave had been approved. Your absence from duty was either intentional or based upon an assumption that the leave you had requested had been granted. Inasmuch as you had no basis upon which to make such an assumption, you had a duty to inquire regarding your leave status before absenting yourself from the work place. You failed to act on that duty. Your failure to obtain an approved leave status continued beyond the date you were informed of my denial of your 12 April 1996 requests. You have been an employee of this district for several years. You should be well-aware of the procedures for requesting the various types of leave. Your contacts with Major Fleischner and Ms. Manrique on 16 April also indicate to me that you were aware you should have contacted someone in your supervisory chain of command before absenting yourself from work on 18 April. I find you did not follow proper procedures during the period for which you have been charged.

6. After consideration of all the relevant factors, including those in the proposal memorandum and the other actors (sic) which might cause mitigation of a penalty, I have determined that the penalty of removal from Federal service is independently warranted for each of the two offenses charged. In making this decision, I considered the fact that you were suspended twice this year. By these prior suspensions, as well as by earlier warnings you received regarding your misconduct, you have received the benefit of measured, progressive disciplinary action for your various and continuing acts of misconduct. All prior disciplinary attempts to influence your behavior and correct your misconduct have failed. I see no possibility that any action short of your removal from Federal service will result in a change in your conduct. Therefore, I believe

that your removal is the only appropriate penalty for each of these offenses. It is my belief that the action to remove you from Federal employment will enhance the efficiency of the Federal service.

7. You will therefore be removed from Federal employment effective 5 July 1996. Enclosure 3 is a Standard Form 50, Notification of Personnel Action.

8. Information concerning your entitlement to appeal this action is contained in Enclosure 1. Enclosure 2 is a receipt form.

/s/ Michael J. Mocek
Michael J. Mocek, P.E.
Chief, Engineering Division

3 Encls
1. Employee Entitlement
2. Acknowledgment of Receipt
3. Standard Form 50